

ANALYSIS

Sess. 15 (1983). *See also United States v. Roland*, 31 M.J. 747 (A.C.M.R. 1990).

Subsection (2) makes clear who is to be served with the post-trial review. *See United States v. Robinson*, 11 M.J. 218, 223 n.2 (C.M.A. 1981). This issue has been a source of appellate litigation. *See e.g., United States v. Kincheloe*, 14 M.J. 40 (C.M.A. 1982); *United States v. Babcock*, 14 M.J. 34 (C.M.A. 1982); *United States v. Robinson*, *supra*; *United States v. Clark*, 11 M.J. 70 (C.M.A. 1981); *United States v. Elliot*, 11 M.J. 1 (C.M.A. 1981); *United States v. Marcoux*, 8 M.J. 155 (C.M.A. 1980); *United States v. Brown*, 5 M.J. 454 (C.M.A. 1978); *United States v. Davis*, 5 M.J. 451 (C.M.A. 1978); *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978); *United States v. Annis*, 5 M.J. 351 (C.M.A. 1978). The last sentence in this subsection is based on *United States v. Robinson*, *United States v. Brown*, and *United States v. Iverson*, all *supra*. The discussion is based on *United States v. Robinson*, *supra*.

Subsection (3) is based on *United States v. Babcock*, *supra*; *United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978); *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976). Ordinarily the record will have been provided to the accused under R.C.M. 1104(b).

Subsections (4) and (5) are based on Article 60(d). *See also United States v. Goode*, *supra*. *See United States v. McAdoo*, 14 M.J. 60 (C.M.A. 1982).

1986 Amendment: Subsection (5) was amended to reflect amendments to Article 60, UCMJ, in the “Military Justice Amendments of 1986,” tit. VIII, § 806, National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986). *See Analysis to R.C.M. 1105(c)*.

Subsection (6) is based on Article 60(d). *See also S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983); United States v. Morrison*, *supra*; *United States v. Barnes*, 3 M.J. 406 (C.M.A. 1982); *United States v. Goode*, *supra*. *But see United States v. Burroughs*, *supra*; *United States v. Moles*, 10 M.J. 154 (C.M.A. 1981) (defects not waived by failure to comment).

Subsection (7) is based on *United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

1994 Amendment: Subsection (f)(7) was amended to clarify that when new matter is addressed in an addendum to a recommendation, the addendum should be served on the accused and the accused’s counsel. The change also clarifies that the accused has 10 days from the date of service in which to respond to the new matter. The provision for substituted service was also added. Finally, the Discussion was amended to reflect that service of the addendum should be established by attachments to the record of trial.

Rule 1107 Action by convening authority

(a) *Who may take action.* This subsection is based on Article 60 (c). It is similar to the first sentence of paragraph 84 *b* and the first sentence of paragraph 84 *c* of MCM, 1969 (Rev.) except insofar as the amendment of Article 60 provides otherwise. *See Military Justice Act of 1983*, Pub.L. No. 98-209, § 5(a)(1), 97 Stat. 1393 (1983). The first paragraph in the discussion is based on the last two sentences of paragraph 84 *a* of MCM, 1969 (Rev.). The second paragraph of the discussion is based on the second and third sentences of paragraph 84 *c* of MCM, 1969 (Rev.); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979); *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976); *United States v. Choice*,

23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *See also United States v. James*, 12 M.J. 944 (N.M.C.M.R.), *pet. granted*, 14 M.J. 235 (1982) *rev’d* 17 M.J. 51. The reference in the third sentence of paragraph 84 *c* of MCM, 1969 (Rev.) to disqualification of a convening authority because the convening authority granted immunity to a witness has been deleted. *See United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). Note that although *Newman* held that a convening authority is not automatically disqualified from taking action by reason of having granted immunity, the Court indicated that a convening authority may be disqualified by granting immunity under some circumstances.

(b) *General considerations.* Subsection (1) and the discussion are based on Article 60(c). *See also S.Rep. No. 53, 98th Cong., 1st Sess. 19 (1983)*.

Subsection (2) is based on Article 60(b) and (c).

Subsection (3)(A)(i) is based on Article 60(a). Subsection (3)(A)(ii) is based on Article 60(d). Subsection (3)(A)(iii) is based on Article 60(b) and (d). Subsection (3)(B) is based on Article 60 and on S.Rep. No. 53, 98th Cong., 1st Sess. 19–20 (1983). The second sentence in subsection (3)(B)(iii) is also based on the last sentence of paragraph 85 *b* of MCM, 1969 (Rev.). *See also United States v. Vara*, 8 U.S.C.M.A. 651, 25 C.M.R. 155 (1958); *United States v. Lanford*, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955).

2014 Amendment. The prohibition against considering matters that relate to the character of a victim expands upon the prohibition against considering “submitted” matters that is set forth in section 1706(b) of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 961 (2013). This revision does not incorporate the word “submitted” from section 1706(b), in order to afford greater protection to the victim by prohibiting convening authority consideration of any evidence of a victim’s character not admitted into evidence at trial, no matter the source.

Subsection (4) is based on Article 60(c)(3). *See also Article 60 (e)(3)*. This subsection is consistent with paragraph 86 *b*(2) of MCM, 1969 (Rev.) except that it does not refer to examining the record for jurisdictional error.

1990 Amendment: Subsection (b)(4) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50 *a*, UCMJ (Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986)).

Subsection (5) is based on the second paragraph of paragraph 124 of MCM, 1969 (Rev.). *See also United States v. Korzeniewski*, 7 U.S.C.M.A. 314, 22 C.M.R. 104 (1956); *United States v. Washington*, 6 U.S.C.M.A. 114, 19 C.M.R. 240 (1955); *United States v. Phillips*, 13 M.J. 858 (N.M.C.M.R. 1982).

1986 Amendment: The fourth sentence of subsection (b)(5) was amended to shift to the defense the burden of showing the accused’s lack of mental capacity to cooperate in post-trial proceedings. This is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which also shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility. The second sentence was added to establish a presumption of capacity and the third sentence was amended to allow limitation of the scope of the sanity board’s examination. The word “substantial” is used in the second and third sentences to indicate that considerable more credible evidence than merely an allegation of lack of capacity is required before further inquiry need be made. *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 2610 (1986) (Powell, J., concurring).

1998 Amendment: Congress created Article 76b, UCMJ in section 1133 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 464-66 (1996). It gives the convening authority discretion to commit an accused found not guilty only by reason of a lack of mental responsibility to the custody of the Attorney General.

(c) *Action of findings.* This subsection is based on Article 60 (c)(2). Subsection (2)(B) is also based on Article 60(e)(1) and (3). The first sentence in the discussion is based on *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1182-85 (1949). The second sentence in the discussion is based on Article 60(e)(3). The remainder of the discussion is based on S.Rep. No. 53, 98th Cong., 1st Sess. 21 (1983).

(d) *Action on the sentence.* Subsection (1) is based on Article 60 (c) and is similar to the first paragraph of paragraph 88 a of MCM, 1969 (Rev.). The first paragraph of the discussion is based on paragraph 88 a of MCM, 1969 (Rev.). The second paragraph of the discussion is based on *Jones v. Ignatius*, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962); *United States v. Prow*, 13 U.S.C.M.A. 63, 32 C.M.R. 63 (1962); *United States v. Johnson*, 12 U.S.C.M.A. 640, 31 C.M.R. 226 (1962); *United States v. Christenson*, 12 U.S.C.M.A. 393, 30 C.M.R. 393 (1961); *United States v. Williams*, 6 M.J. 803 (N.C.M.R.), *pet. dismissed*, 7 M.J. 68 (C.M.A. 1979); *United States v. Berg*, 34 C.M.R. 684 (N.B.R. 1963). *See also United States v. McKnight*, 20 C.M.R. 520 (N.B.R. 1955).

2002 Amendment: The Discussion accompanying subsection (d)(1) was amended to implement the amendment to 10 U.S.C. Sec. 819 (Article 19, UCMJ) contained in section 577 of the National Defense Authorization Act for Fiscal Year 2000, P. L. No. 106-65, 113 Stat. 512 (1999) increasing the jurisdictional maximum punishment at special courts-martial. R.C.M. 1107(d)(4) was amended to include the additional limitations on sentence contained in Article 19, UCMJ.

Subsection (2) is based on Article 60(c) and S. Rep. No. 53, 98th Cong., 1st Sess. 19 (1983). The second sentence is also based on *United States v. Russo*, 11 U.S.C.M.A. 352, 29 C.M.R. 168 (1960). The second paragraph of the discussion is based on the third paragraph of paragraph 88 b of MCM, 1969 (Rev.). *1995 Amendment:* The last sentence in the Discussion accompanying subsection (d)(2) is new. It clarifies that forfeitures adjudged at courts-martial take precedence over all debts owed by the accused. Department of Defense Military Pay and Allowances Entitlement Manual, Volume 7, Part A, paragraph 70507a (12 December 1994).

Subsection (3) is based on Articles 19 and 54(c)(1) and on the third sentence of paragraph 82 b(1) of MCM, 1969 (Rev.).

1995 Amendment: Subsection (d)(3) is new. It is based on the recently enacted Article 57(e). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2505 (1992). *See generally* Interstate Agreement on Detainers Act, 18 U.S.C. App. III. It permits a military sentence to be served consecutively, rather than concurrently, with a civilian or foreign sentence. The prior subsection (d)(3) is redesignated (d)(4).

1998 Amendment: All references to “postponing” service of a sentence to confinement were changed to use the more appropriate term, “defer”.

2002 Amendment: Subsection (d)(4) was amended as a result of the enactment of Article 56a, UCMJ, in section 581 of the National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629, 1759 (1997).

Subsection (d)(5) is new. The amendment addresses the impact of Article 58b, UCMJ. In special courts-martial, where the cumulative impact of a fine and forfeitures, whether adjudged or by operation of Article 58b, would otherwise exceed the total dollar amount of forfeitures that could be adjudged at the special court-martial, the fine and/or adjudged forfeitures should be disapproved or decreased accordingly. *See generally United States v. Tualla*, 52 M.J. 228, 231-32 (2000).

(e) *Ordering rehearing or other trial.* Subsection (1)(A) is based on Article 60(e), and on paragraph 92 a of MCM, 1969 (Rev.). Note that the decision of the convening authority to order a rehearing is discretionary. The convening authority is not required to review the record for legal errors. Authority to order a rehearing means, therefore, “designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under Article 60(c).” S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). Subsection (1)(B) is based on Article 60(e). As to subsection (1)(B)(ii), *see* S. Rep. No. 53, *supra* at 22. Subsection (1)(B)(ii) is based on the second sentence of the second paragraph of paragraph 92 a of MCM, 1969 (Rev.). The discussion is based on the second sentence of the fourth paragraph of paragraph 92 a of MCM, 1969 (Rev.). Subsection (1)(C)(i) is based on Article 62(e)(3) and on the first sentence of the third paragraph of paragraph 92 a of MCM, 1969 (Rev.). Subsection (1)(C)(ii) and the discussion are based on Article 60 (e)(3) and on the first paragraph of paragraph 92 a of MCM, 1969 (Rev.). Subsection (1)(C)(ii) is based on the first sentence of the tenth paragraph of paragraph 92 a of MCM, 1969 (Rev.). Subsection (1)(D) is based on the sixth paragraph of paragraph 92 a of MCM, 1969 (Rev.). Subsection (1)(E) is based on the eighth paragraph of paragraph 92 a of MCM, 1969 (Rev.). Because of the modification of Article 71 (*see* R.C.M. 1113) and because the convening authority may direct a rehearing after action in some circumstances (*see* subsection (e)(1)(B)(ii) of this rule), the language is modified. The remaining parts of paragraph 92 a, concerning procedures for a rehearing, are now covered in R.C.M. 810.

1995 Amendment: The second sentence in R.C.M. 110 7(e)(1)(C)(iii) is new. It expressly recognizes that the convening authority may approve a sentence of no punishment if the convening authority determines that a rehearing on sentence is impracticable. This authority has been recognized by the appellate courts. *See e.g., United States v. Montesinos*, 28 M.J. 38 (C.M.A. 1989); *United States v. Sala*, 30 M.J. 813 (A.C.M.R. 1990).

2004 Amendment: The Discussion to R.C.M. 1107(e)(1)(B)(iii) was moved to new subsection (1)(B)(iv) to recognize expressly that, in cases where a superior authority has approved some findings of guilty and has authorized a rehearing as to other offenses, the convening authority may, unless otherwise directed, reassess a sentence based on approved findings of guilty under the criteria established by *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), and dismiss the remaining charges. *See United States v. Harris*, 53 M.J. 86 (2000). The power of convening authorities to reassess had been expressly authorized in paragraph 92a of MCM, 1969. The authorizing language was moved to the Discussion following R.C.M. 1107(e)(1)(B)(iii) in MCM, 1984. The Discussion was amended to advise practitioners to apply the criteria for sentence reassessment established by *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). *See also United States v. Harris*, 53 M.J. 86 (200 0); *United States v. Eversole*, 53 M.J. 132 (2000). The Discussion was further amended to encourage practitioners to seek clarifica-

tion from superior authority where the directive to the convening authority is unclear.

Subsection (2) is based on paragraph 92 *b* of MCM, 1969 (Rev.). See also paragraph 89 *c*(1) of MCM, 1969 (Rev.). If the accused was acquitted of a specification which is later determined to have failed to state an offense, another trial for the same offense would be barred. *United States v. Ball*, 163 U.S. 662 (1896). It is unclear whether an acquittal by a jurisdictionally defective court-martial bars retrial. See *United States v. Culver*, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973).

(f) *Contents of action and related matters.* Subsection (1) is based on paragraph 89 *a* of MCM, 1969 (Rev.).

1991 Amendment: The 1984 rules omitted any requirement that the convening authority's action be included in the record of trial. This amendment corrects that omission.

Subsection (2) is based on paragraph 89 *b* of MCM, 1969 (Rev.). The second sentence is new. It is intended to simplify the procedure when a defect in the action is discovered in Article 65(c) review. There is no need for another authority to formally act in such cases if the convening authority can take corrective action. The accused cannot be harmed by such action. A convening authority may still be directed to take corrective action when necessary, under the third sentence. "Erroneous" means clerical error only. See subsection (g) of this rule. This new sentence is not intended to allow a convening authority to change a proper action because of a change of mind.

1995 Amendment: The amendment allows a convening authority to recall and modify any action after it has been published or after an accused has been officially notified, but before a record has been forwarded for review, as long as the new action is not less favorable to the accused than the prior action. A convening authority is not limited to taking only corrective action, but may also modify the approved findings or sentence provided the modification is not less favorable to the accused than the earlier action. Subsection (3) is based on paragraph 89 *c*(2) of MCM, 1969 (Rev.). The provision in paragraph 89 *c*(2) of MCM, 1969 (Rev.) that disapproval of the sentence also constitutes disapproval of the findings unless otherwise stated is deleted. The convening authority must expressly indicate which findings, if any, are disapproved in any case. See Article 60(c)(3). The discussion is based on paragraph 89 *c*(2) of MCM, 1969 (Rev.). Subsection (4)(A) is based on paragraph 89 *c*(3) of MCM, 1969 (Rev.). The first sentence of paragraph 89 *c*(2) is no longer accurate. Since no action on the findings is required, any disapproval of findings must be expressed. Subsection (4)(B) is taken from paragraph 89 *c*(4) of MCM, 1969 (Rev.). Subsection (4)(D) is based on paragraph 89 *c*(6) of MCM, 1969 (Rev.). However, because that portion of the sentence which extends to confinement may now be ordered executed when the convening authority takes action (see Article 71(c)(2); R.C.M. 1113(b)), temporary custody is unnecessary in such cases. Therefore, this subsection applies only when death has been adjudged and approved. Subsection (4)(E) is taken from paragraph 89 *c*(7) of MCM, 1969 (Rev.). Subsection (4)(F) is new. See Analysis, R.C.M. 305(k). See also *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983). Subsection (4)(G) is taken from paragraph 89 *c*(9) of MCM, 1969 (Rev.). Subsection (4)(H) is modified based on the amendment of Article 71 which permits a reprimand to be ordered executed from action, regardless of the other components of the sentence. Admonition has been deleted. See R.C.M. 1003(b)(1).

Subsection (5) is based on paragraph 89 *c*(8) of MCM, 1969 (Rev.). See also R.C.M. 810(d) and Analysis. The provision in paragraph 89 *c*(8) requiring that the accused be credited with time in confinement while awaiting a rehearing is deleted. Given the procedures for imposition and continuation of restraint while awaiting trial (see R.C.M. 304 and 305), there should not be a credit simply because the trial is a rehearing.

(g) *Incomplete, ambiguous, or erroneous action.* This subsection is based on paragraph 95 of MCM, 1969 (Rev.). See generally *United States v. Loft*, 10 J.M.J. 266 (C.M.A. 1981); *United States v. Lower*, 10 M.J. 263 (C.M.A. 1981).

(h) *Service on accused.* This subsection is based on Article 61(a), as amended, see Military Justice Act of 1983, Pub.L. No. 98-209, § 5(b)(1), 97 Stat. 1393 (1983).